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Yee Weng Kai v Yam Kong Seng & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–2935 OF 2010
ZAINUN ALI (NOW FCJ), RAMLY ALI AND ZAHARAH IBRAHIM JJCA
30 JANUARY 2012

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Civil Procedure — Appeal — Claim for debt owing — Monies places to be withdrawn progressively for building of factory — Demand for outstanding amount when factory completed — When cause of action accrued — Principle under s 26 of the Limitation Act 1953 — Requirements of acknowledgment under s 27 of same Act — Brief and ambiguous SMS of loan repayment received — Whether SMS received regarding loan repayment fulfilled requirements under s 27 — Whether SMS could amount to valid acknowledgment of debt — Limitation Act 1953 ss 6(1), 26 & 27

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Limitation — Accrual of cause of action — Acknowledgment of debt by defendant — Letter relating loan repayment issued together with statement of account — Writ and statement of claim issued three months later — Whether application exceeded six years under Limitation Act 1953 — Limitation Act 1953 s 6(1)

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In the High Court, the respondents claimed against the appellant and the first defendant for debt owing. The respondents alleged that they had engaged the first defendant (a company where the appellant was a director at the material time) through the appellant, to build a factory on a piece of land. The respondents further claimed they had placed monies in the name of the first defendant to be withdrawn for progressive payments in order to construct the said factory. When the said factory was completed, the respondents demanded for the return of the outstanding sum of RM589,055.61. Before the High Court, the respondents sought the sum of RM1,531,583.93 due and payable to the respondents; the interest of 1% per month on the outstanding sum of RM589,055.61 as agreed compensation for the loss and/or damage suffered by the respondents from 1 January 2008 until the date of full settlement; costs on a full indemnity solicitor-client basis; and any other further orders and/or reliefs that the court deems fit and proper. The High Court granted judgment in favour of the respondents and the appellant was ordered to pay the judgment sum of RM589,055.61 with the interest of 1% per month. Dissatisfied, the appellant filed the present appeal on the ground that the cause of action first arose either on 7 July 1999 (when the factory was completed and handed over to Bryony Sdn Bhd's tenant) or on 17 December 1999 when the first defendant issued a letter together with the statement of account (as at 30 November

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1999). However, the writ and the statement of claim in the present action was filed on 7 March 2008 ie eight years and three months later and therefore, was outside six years prescribed under s 6(1) of the Limitation Act 1953 ('Act'). The six years period would have lapsed on 16 December 2005. The respondents' case against the appellant was based on contract which must be filed in court within the period of six years from the date of the cause of action as provided for under s 6(1) of the Act. The time begins to run from the earliest time at which the respondents (as the plaintiffs) could have brought the action. The respondents also grounded their claim on an SMS sent by the appellant which spoke briefly and ambiguously on the loan repayment.

Held, allowing the appeal with costs:

(1) Section 26(2) of the Act recognises that the right of action in cases where the debtor acknowledges the claim or make any payment shall be deemed to have accrued on and not before the date of the acknowledgment. Further, s 27 of the Act provides that the acknowledgement in question must be in writing and duly signed by the person making it (see paras 10 & 12).

(2) The said SMS was not an unequivocal admission of a subsisting debt as it did not quantify the so-called debt in figures nor was it capable of ascertainment by calculation or by extrinsic evidence without further agreement between the parties. Further, the said SMS was ambiguous and unclear. It referred to a 'loan repayment' which was not the pleaded case of the respondents (see para 18).

(3) The said SMS was an electronic short message. It could not be considered to be in writing and was not signed as required under s 27(1) of the Act. It might have come from the appellant's hand phone, but it did not necessarily mean that it was the appellant who actually made or wrote the message. Therefore, the requirements under s 27 of the Act were not fulfilled; and therefore the said SMS could not, in law, amount to a valid acknowledgment of the debt claimed by the respondents against the appellant for the purpose of s 26(2) of the same Act (see para 19).

(4) There was no evidence of any acknowledgment of debt as alleged by the respondents. Therefore, the appellant's version that the time of the cause of action (if any) started to run either from 7 July 1999 (when the factory was completed and handed over to Byrony Sdn Bhd) or 17 December 1999 (when the letter of the statement of account was issued by the first defendant), must be accepted. The writ and the statement of claim was only filed on 7 March 2008. The respondents' action clearly had exceeded the six year period as stipulated under s 6(1) of the Act and therefore, time-barred. On this ground alone, the respondents' claim against the appellant must fail and the appeal should be allowed (see para 20).

(5) There was no evidence, either in the form of document or otherwise adduced during trial to show that the appellant had held himself out to be personally liable for the amount claimed by the respondents. The liability to refund or to repay the amount claimed by the respondents laid with the first defendant company but not with the appellant (the second defendant) who was dealing with the respondents (see para 27).

(6) In order to validly pierce the corporate veil, there must be sufficient justification or special circumstances must exist in order to do justice. The respondents must lay sufficient evidential foundation to support the plea of lifting the corporate veil. However, fraud was never an issue that was pleaded by the respondents and also, there was no evidence of fraud ever adduced by any party during the trial. There was nothing to indicate that the first defendant company was a mere facade concealing the true fact of the transactions. Therefore, this was not an appropriate case for the court to lift the corporate veil and to attach liability to the appellant in relation to actions or debts by the first defendant company (see paras 28–30).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, responden-responden menuntut hutang yang perlu dijelaskan daripada perayu dan defendan pertama. Responden-responden mendakwa bahawa mereka telah melantik defendan pertama (sebuah syarikat yang mana perayu merupakan seorang pengarah pada masa material) melalui perayu, untuk membina sebuah kilang di atas sebidang tanah. Responden-responden juga mendakwa bahawa mereka telah meletakkan wang di bawah nama defendan pertama untuk dikeluarkan bagi pembayaran progresif dalam usaha untuk membina kilang tersebut. Apabila kilang tersebut telah siap, responden menuntut pengembalian jumlah tertunggak sebanyak RM589,055.61. Di hadapan Mahkamah Tinggi, responden-responden memohon jumlah RM1,531,583.93 yang terhutang dan perlu dijelaskan kepada responden-responden; faedah 1% sebulan ke atas jumlah tertunggak RM589,055,61 sebagai pampasan yang dipersetujui bagi kerugian dan/atau kerosakan yang dialami oleh responden-responden dari 1 Januari 2008 sehingga tarikh penyelesaian penuh, kos atas dasar indemniti penuh peguam-pelanggan; dan apa-apa perintah lain lagi dan/atau relief yang mahkamah fikirkan patut dan wajar. Mahkamah Tinggi memberikan penghakiman berpihak kepada responden-responden dan perayu diperintahkan untuk membayar jumlah penghakiman sebanyak RM589,055.61 dengan faedah 1% sebulan. Tidak berpuas hati, perayu memfailkan rayuan ini atas alasan bahawa kausa tindakan timbul sama ada pada 7 Julai 1999 (apabila kilang telah siap dan diserahkan kepada penyewa Bryony Sdn Bhd itu) atau pada 17 Disember 1999 apabila defendan pertama mengeluarkan surat bersama-sama dengan penyata akaun (seperti pada 30 November 1999). Walau bagaimanapun, writ dan penyataan tuntutan

dalam tindakan ini telah difailkan pada 7 Mac 2008 iaitu lapan tahun dan tiga bulan kemudian dan oleh itu, melebihi enam tahun yang ditetapkan di bawah s 6(1) Akta Had Masa 1953 ('Akta'). Tempoh enam tahun luput pada 16 Disember 2005. Kes responden terhadap perayu adalah berdasarkan kontrak yang perlu difailkan di mahkamah dalam tempoh enam tahun dari tarikh kausa tindakan sebagaimana yang diperuntukkan di bawah s 6(1) Akta. Masa bermula dari masa terawal yang mana responden-responden (sebagai plaintif-plaintif) boleh membawa tindakan. Responden-responden juga mengasaskan tuntutan mereka berdasarkan SMS ringkas yang dihantar oleh perayu yang menyatakan mengenai pembayaran pinjaman.

Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 26(2) Akta mengiktiraf bahawa hak tindakan dalam kes-kes yang mana penghutang memperakui tuntutan tersebut atau membuat apa-apa pembayaran hendaklah disifatkan sebagai telah terakru pada dan bukan sebelum tarikh perakuan. Selanjutnya, s 27 Akta memperuntukkan bahawa perakuan tersebut mestilah secara bertulis dan ditandatangani oleh orang yang membuatnya (lihat perenggan 10 & 12).

(2) SMS tersebut bukanlah perakuan jelas bagi hutang yang wujud kerana ia tidak mengira hutang yang dikatakan tersebut dalam angka dan tidak pula ia boleh ditentukan melalui pengiraan atau melalui keterangan ekstrinsik tanpa persetujuan lanjut daripada kedua pihak. Selanjutnya, SMS tersebut kabur dan tidak jelas. Ia merujuk kepada 'loan repayment' yang tidak menjadi kes yang diplidkan oleh responden-responden (lihat perenggan 18).

(3) SMS tersebut merupakan pesanan ringkas elektronik. Ia tidak boleh dianggap sebagai bertulis dan tidak ditandatangani sebagaimana yang dikehendaki oleh s 27(1) Akta. Ia mungkin dihantar daripada telefon bimbit perayu, tetapi ia tidak semestinya bermakna bahawa perayu yang sebenarnya membuat atau menulis mesej tersebut. Oleh itu, keperluan di bawah s 27 Akta tidak dipenuhi dan dengan itu SMS tersebut tidak boleh, di bawah undang-undang, terjumlah kepada pengakuan hutang yang sah yang dituntut oleh responden-responden terhadap perayu bagi maksud s 26(2) Akta yang sama (lihat perenggan 19).

(4) Tiada bukti perakuan mana-mana hutang seperti yang didakwa oleh responden-responden. Oleh itu, versi perayu bahawa masa kausa tindakan (jika ada) bermula sama ada dari 7 Julai 1999 (apabila kilang telah siap dan diserahkan kepada Byrony Sdn Bhd) atau 17 Disember 1999 (apabila surat penyata akaun dikeluarkan oleh defendan pertama), mesti diterima. Writ dan penyataan tuntutan hanya difailkan pada 7 Mac 2008. Tindakan responden-responden jelas telah melebihi tempoh enam tahun seperti yang termaktub di bawah s 6(1) Akta dan oleh itu, terhalang oleh had masa. Atas alasan ini sahaja, tuntutan

responden-responden terhadap perayu semestinya gagal dan rayuan harus dibenarkan (lihat perenggan 20).

(5) Tiada bukti, sama ada dalam bentuk dokumen atau sebaliknya yang dikemukakan semasa perbicaraan untuk menunjukkan bahawa perayu telah memutuskan yang dirinya adalah bertanggungan sendiri bagi jumlah yang dituntut oleh responden-responden. Liabiliti untuk memulangkan semula atau untuk membayar balik amaun yang dituntut oleh responden-responden terletak pada syarikat defendan pertama tetapi bukan dengan perayu (defendan kedua) yang berurusan dengan responden-responden (lihat perenggan 27).

(6) Dalam usaha untuk menyingkap tabir korporat secara sah, mestilah terdapat justifikasi yang mencukupi atau mestilah wujud keadaan khas dalam usaha untuk mencapai keadilan. Responden-responden mesti meletakkan asas bukti yang kukuh untuk menyokong rayuan bagi menyingkap tabir korporat. Walau bagaimanapun, penipuan tidak pernah menjadi isu yang diplidkan oleh responden-responden dan juga, tiada keterangan penipuan pernah dikemukakan oleh mana-mana pihak semasa perbicaraan. Tidak terdapat apa-apa untuk menunjukkan bahawa syarikat defendan pertama adalah semata-mata topeng yang menyembunyikan hakikat sebenar urusniaga. Oleh itu, ini bukanlah kes yang sesuai bagi mahkamah menyingkap tabir korporat dan untuk meletakkan liabiliti ke atas perayu berhubung tindakan atau hutang oleh syarikat defendan pertama (lihat perenggan 28–30).]

Notes

For a case on acknowledgment of debt by defendant, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2138.

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1997] 3 MLJ 661; [1997] 4 CLJ 437, CA (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97; [1987] CLJ (Rep) 50, SC (refd)

Good v Parry [1963] 2 All ER 59, CA (folld)

Johnson Medical Equipment Sdn Bhd v Yeo Eng Lam [2011] MLJU 165; [2011] 1 LNS 134, HC (refd)

Kwong Yik Bank Bhd v Kwan Chew Holdings Sdn Bhd [2009] MLJU 632; [2011] 2 CLJ 269, CA (folld)

Low Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

Nihal Singh v Bhag Singh [1977] 1 MLJ 8 (refd)

Reeves v Butcher [1891] 2 QB 509, CA (refd)

Solomon v Solomon & Co Ltd [1895–9] All ER Rep 33 (refd)

Wee Tiang Teng v Ong Chong Hooi & Anor [1978] 2 MLJ 54, FC (folld)

Legislation referred to

Limitation Act 1953 ss 6(1), 26(2), 27, 27(1)

Appeal from: Civil Suit No S3-22–273 of 2008 (High Court, Kuala Lumpur)

M Menon (V Mugunthan with him) (Jaffar & Menon) for the appellant.
Malik Imtiaz (Ronnie Yoon with him) (Scully Yoon) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

THE APPEAL

[1] This is an appeal against the whole decision of the learned High Court judge, dated 22 September 2010 allowing the respondents' claim against the appellant with costs after full trial. The appellant was the second defendant at the court below.

THE RESPONDENTS' CLAIM

[2] The respondents commenced an action in the High Court against the appellant and the first defendant for debt owing to them. The respondents' claim was that they had engaged the first defendant (a company where the appellant was a director at the material time) through the appellant to build a factory on a piece of land bearing the postal address of Lot 6486, No 2 Jalan PJS 3/2 Taman Medan, Mukim Petaling off Old Klang Road, 46000 Petaling Jaya, Selangor.

[3] The respondents claimed they had placed certain amounts of monies in the name of the first defendant to be withdrawn for progress payments for the construction of the said factory. The said factory was completed and the respondents asked for the return of the outstanding sum of RM589,055.61.

[4] In their statement of claim, the respondents sought the following remedies, namely:

(a) the sum of RM1,531,583.93 due and payable to the respondents as at 31 December 2007;

(b) the interest of 1% per month on the outstanding sum of RM589,055.61 as agreed compensation for the loss and/or damage suffered by the respondents from 1 January 2008 until the date of full settlement;

(c) costs on a full indemnity solicitor-client basis; and

(d) any other further orders and/or reliefs that the court deems fit and proper.

[5] The matter went for full trial before the learned High Court judge. The respondents led evidence by calling three witnesses and the appellant by calling one witness. As against the appellant (the second defendant in the suit) judgment was entered in favour of the respondent and the appellant was ordered to pay the judgment sum of RM589,055.61 with simple interest of 1% per month.

[6] Dissatisfied with the said judgment, the appellant filed a notice of appeal. Hence the present appeal before us.

OUR FINDINGS

[7] The first issue raised by the appellant at the High Court as well as before us, was the issue of limitation under the Limitation Act 1953. The appellant contended that the cause of action first arose either on 7 July 1999 (when the factory was completed and handed over to Bryong Sdn Bhd's tenant) or on 17 December 1999 when the first defendant issued a letter together with the statement of account (as at 30 November 1999). The writ and the statement of claim in the present action was filed on 7 March 2008 ie eight years and three months later, which clearly is outside the prescribed period of six years under s 6(1) of the Limitation Act 1953. The six years period would have lapsed on 16 December 2005.

[8] The learned High Court judge agreed with the respondents and found that there was an acknowledgment of debt. She relied on the short messaging service ('SMS') that the appellant had sent to PW1 on 5 September 2006. The learned judge concluded that the SMS amount to a fresh acknowledgement of the debt and therefore time started to run afresh from that date (5 September 2006). Therefore the learned judge concluded that the defence of limitation as raised by the appellant does not have any merit at all.

[9] The respondents' claim against the appellant in the present action basically is based on contract which must be filed in court within the period of six years from the date of the cause of action as provided for under s 6(1) of the Limitation Act 1953. The time begins to run from the earliest time at which the respondents (as the plaintiffs) could have brought the action (see *Reeves v Butcher* [1891] 2 QB 509).

[10] However, s 26(2) of the Limitation Act 1953 recognises that the right of action in cases where the debtor acknowledges the claim or make any payment in respect thereof shall be deemed to have accrued on and not before the date of the acknowledgment.

[11] Section 26(2) of the Act reads:

(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment

[12] The acknowledgment in question must be in writing and duly signed by the person making it. This is clearly provided for under s 27 of the Act, which reads:

Formal provisions as to acknowledgments and part payments.

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(1) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[13] The respondents mentioned about the said acknowledgment in paras 20–23 of the statement of claim where they alleged that the appellant had acknowledged as to the existence of the debt claimed by the respondents against them. Reading closely the above paragraphs in the statement of claim, we found that paras 20 and 23 relate to oral representation allegedly made by the appellant. With respect, oral representations which are not in writing (therefore not signed by the person making it), do not amount to valid acknowledgment under s 27(1) of the Limitation Act 1953. This is clear and well-settled.

[14] Paragraphs 21–22 talk about the SMS dated 5 September 2006 claimed to have been sent by the appellant to the first respondent, which reads:

Eddy sorry to hear ur father death, regarding the loan repayment sorting soon not 2 worry now Im in UK London next week.

[15] What amounts to a valid acknowledgment of debt can be found in the dicta of Lord Denning MR in *Good v Parry* [1963] 2 All ER 59, wherein His Lordship observed:

In order to be an acknowledgement, however, the debt must be quantified in figures or at all events, it must be liquidated in this sense that it is capable of ascertainment by calculation, or by extrinsic evidence, without further agreement between the

A parties. For instance: 'I admit I owe you the sum shown in this rent book' would be a perfectly good acknowledgement, for it only needs to be calculated. Again in *Jones v Bellgrove Properties, Ltd* (5), the balance sheet contained the acknowledgement: 'To sundry creditors 7,638 s 10d'. It was possible by extrinsic evidence to sort out the various items in that lump sum, and it was held to be a sufficient acknowledgement. But if the debt is not quantified and is not ascertainable without further agreement, B then there is no acknowledgement sufficient to satisfy the statute.

[16] The point was made clearer by the Federal Court in *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54, wherein Suffian LP said, at p 56:

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> … With respect we are of opinion that the letter in question was not a sufficient acknowledgement within our s 26(2). By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff, and even if it was an acknowledgement the debt acknowledged was not quantified in figures nor was it capable of ascertainment by D counterclaim or by extrinsic evidence without further agreement of the parties. In consolidated *Agencies Ltd v Bertram Ltd* the Privy Council at p 482 approved the following statement of an author on the law of limitation:
>
> > To take a demand out of the statute of limitation on the ground of E acknowledgement, the language of the debtor must amount to an unequivocal admission of a subsisting debt that is, subsisting at the time of its acknowledgement

F **[17]** In short, in order to constitute a valid acknowledgment for the purpose of s 26(2) of the Limitation Act 1953 there must be evidence to show that there was unequivocal admission of a subsisting debt by the defendant at the time of the acknowledgment (see *Kwong Yik Bank Bhd v Kwan Chew Holdings Sdn Bhd* [2009] MLJU 632; [2011] 2 CLJ 269, Court of Appeal decision).

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[18] Applying the above propositions, we find that the said SMS is not an unequivocal admission of a subsisting debt as it does not quantify the so called debt in figures nor is it capable of ascertainment by calculation or by extrinsic evidence without further agreement between the parties. Further, the said SMS H was ambiguous and unclear. It refers to a 'loan repayment' which is not the pleaded case of the respondents. Paragraph 21 of the statement of claim clearly pleads that the said SMS was a demand made to the appellant for 'the return of the monies'. No mention about a 'loan repayment' (as mentioned in the SMS).

I **[19]** The said SMS is an electronic short message. It cannot be considered to be in writing and was not signed as required under s 27(1) of the Limitation Act 1953. It may have come from the appellant's hand phone, but it does not necessarily mean that it was the appellant who actually made or wrote the message. Therefore, the requirements under s 27 of the Limitation Act 1953

are not fulfilled; and therefore the said SMS cannot in law amount to a valid acknowledgment of the debt claimed by the respondents against the appellant for the purpose of s 26(2) of the same Act (see *Nihal Singh v Bhag Singh* [1977] 1 MLJ 8, and *Johnson Medical Equipment Sdn Bhd v Yeo Eng Lam* [2011] MLJU 165; [2011] 1 LNS 134).

[20] That being the case, we find that there is no evidence of any acknowledgment of debt as alleged by the respondents. Therefore, the appellant's version that the time of the cause of action (if any) starts to run either from 7 July 1999 (when the factory was completed and handed over to Byrony Sdn Bhd) or 17 December 1999 (when the letter of the statement of account was issued by the first defendant), must be accepted. The writ and the statement of claim was only filed on 7 March 2008. The respondents' action clearly had exceeded the six year period as stipulated under s 6(1) of the Limitation Act 1953 and therefore time barred. On this ground alone we strongly feel the respondents' claim against the appellant must fall and the appeal before us could and should be allowed.

[21] The appellant had also raised the issue that being an officer or a director of the first defendant's company the appellant (as the second defendant) cannot be held liable for the debt or liability of the first defendant.

[22] The respondents' claim against the defendants (including the appellant) in this case was based on contract or agreement whereby the respondents had engaged the service of the first defendant company to build and construct a factory on that piece of land bearing the postal address of Lot 6486, No 2, Jalan PJS 3/2, Taman Medan, Mukim Petaling off Old Klang Road, 46000 Petaling Jaya, Selangor. The respondents then took an overdraft facility from ING Asia Private Bank Ltd Singapore to finance the construction of the factory. The respondents then converted the loan from ING (the lender) into Malaysian Ringgit and had in September 1998 deposited the total sum of RM1,310,000 into the first defendant's fixed deposit accounts in RHB Bhd for the purpose of facilitating the progress payments due and payable to the first defendant in respect of the construction of the factory.

[23] As stated in the statement of claim the first defendant had by its letter in writing dated 17 December 1999 confirmed that the final amount due to the first defendant for the construction of the factory was RM480,977.17 and that the balance amount outstanding due to be refunded to the respondents after deducting the first defendant's final bill was RM589,055.61.

[24] The respondents in their statement of claim (particularly paras 15, 18 and 20) had clearly admitted and stated that the second defendant (the appellant herein) was 'lawfully acting for and on behalf of the 1st Defendant at

all material times'. It was also stated in para 2 of the statement of claim that 'the 2nd Defendant (the Appellant herein) is at all material times the managing director and majority shareholder of the 1st Defendant'.

[25] It is trite law that a company and its officers as well as the shareholders are separate legal entities (see *Solomon v Solomon & Co Ltd* [1895–9] All ER Rep 33). A company which has been validly incorporated under the law is a legal entity separate and distinct from the officers and its shareholders. It must be treated like any other independent person with rights and liabilities appropriate to itself. It can sue and be sued in its own name and being an artificial person, it can only act through its directors and officers. It enters into a contract or agreement through its directors and authorised officers. A director or an authorised officer of a company who executes an agreement or enters into contract on the company's behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or the contract itself or other documents such as a personal guarantee or letter of indemnity/undertaking, to the contrary making the directors or officers personally liable for the breaches or acts of the company.

[26] The Court of Appeal, in the case of *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1997] 3 MLJ 661; [1997] 4 CLJ 437 had on the issue, made the following ruling:

> The fact that the agreement was executed by the second and third respondents as directors of Nusantara Timur does not make the second and third respondents personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely Nusantara Timur's, the contracting party.

[27] In the present case, there is no evidence, either in the form of document or otherwise adduced during trial to show that the appellant had held himself out to be personally liable for the amount claimed by the respondents. The liability to refund or to repay the amount claimed by the respondents lies with the first defendant company (if at all), but not with the appellant (the second defendant) who was dealing with the respondents purely 'acting for and on behalf of the first defendant at all material times' as admitted by the respondents in their statement of claim.

[28] In attaching liability to the appellant in the present case, it seems that the learned High Court judge was trying to pierce the corporate veil and held the appellant personally liable for the actions of the first defendant company. We are of the view that in order to validly pierce the corporate veil, there must be sufficient justification or special circumstances must exist in order to do justice. The respondents (being the plaintiffs at the High Court) must lay

sufficient evidential foundation to support the plea of lifting the corporate veil, (see *Low Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] MLJU 225; [2005] 3 CLJ 355 — Court of Appeal).

[29] The Supreme Court in the case of *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97; [1987] CLJ (Rep) 50 ruled that 'the court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequence of lifting the veil would vary according to the circumstances of each case'.

[30] In the present case fraud was never an issue that was pleaded by the respondents in their statement of claim. Also, there is no evidence of fraud ever adduced by any party during the trial. There is nothing to indicate that the first defendant company was a mere facade concealing the true fact of the transactions. Therefore, we are of the view that this is not an appropriate case for the court to lift the corporate veil and to attach liability to the appellant in relation to actions or debts by the first defendant company.

[31] The learned judge in her grounds judgment made a finding that the respondents had placed a certain amount of money in the sum of RM1,310,000 in the name of the first defendant company to be withdrawn for progress payments for the construction of the factory. At the end of the judgment, she concluded that 'suit against D2 allowed with costs, based on RM589,055.61 with simple interest at 1% and parties to recalculate the amount of interest'.

[32] A perusal of the entire grounds of judgment clearly show that the learned judge did not address the issue of how the appellant was liable for the monies placed with the first defendant company in the name of the first defendant and for the purpose of progress payment payable to the first defendant. The mere fact that the appellant had sent an SMS cannot in law constitute a legal liability on him, without any valid cause of action in law being disclosed against him.

[33] The respondents had failed to disclose and to establish a valid cause of action against the appellant. This failure is fatal to the respondents' case against the appellant. This is another ground for the appeal before us to be allowed and the decision of the learned judge to be set aside.

CONCLUSIONS

[34] Based on the above considerations, we find that the learned judge was clearly wrong in entering judgment against the appellant (the second defendant at the court below). The said judgment has to be set aside. We

therefore, allow the appeal with costs of RM20,000 to the appellant. We make an order that the costs at the High Court level to be taxed, for the benefit of the appellant, and that the deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor